WOODSVILLE SDN BHD A

v.

TIEN IK ENTERPRISE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D-28-187-1990]
29 JULY 2010

CIVIL PROCEDURE: *Contempt of court - Committal proceedings - Leave to commit liquidator for breach of court orders and concealment of information - Whether contempt proved - Whether committal proceedings can be taken if court order not served personally on liquidator - Payment of liquidator's fees from company assets approved by Committee of Inspection - Whether payment breached court order - Rules of the High Court 1980, O. 45 r. 7(3) & (4), O. 52* C D

The first respondent, Tien Ik Enterprise Sdn Bhd ('the company') was wound up on the petition of Woodsville Sdn Bhd ('the petitioner'), pursuant to which Gong Wee Ning ('Gong') was appointed as the company's liquidator. The petitioner applied under O. 52 of the Rules of the High Court 1980 (RHC) for leave to commence committal proceedings against Gong. It was premised on the grounds: (i) that Gong had failed to comply with an order of the Court of Appeal ('the Court of Appeal order') directing the liquidation to be completed within 4 months of the order and (ii) that Gong had contravened a High Court order dated 21 February 2005 ('the High Court order') by paying out from the assets of the companies in liquidation RM1,019,000 as liquidator's fees as at 15 February 2007. Apart from these grounds it was also alleged that Gong had, in a previous abortive application by the petitioner to remove him as liquidator, deposed an affidavit denying the existence and knowledge of the ownership of certain lands known as 'the Tualang Lands'. The Tualang Lands were beneficially owned by a company known as TTDM whose entire shares were owned by the first respondent. It was alleged that when Gong subsequently discovered the existence of the lands, he proceeded to dispose them of without notifying the petitioner. E F G H

Held (dismissing the application for leave with costs):

(1) The Court of Appeal order was not served personally on the liquidator as was required under O. 45 r. 7(3) RHC. There was no evidence indicative of the fact that the liquidator had any appropriate notice of the order. Therefore Gong could not be said to have committed contempt. (para 54) I

(2) The High Court order dismissed the liquidator's application for an increased rate of remuneration. It did not set aside the court order dated 14 February 1996 which allowed the liquidator liberty from time to time to apply reasonable amounts from monies and assets in their hands against their fees and disbursements. (paras 39 & 40)

(3) There was an agreement between the liquidator and the Committee of Inspection (COI) as to the fees to be deducted. Since the COI had approved the remuneration in August 1999, the liquidators were entitled to it. The total amount of remuneration was RM1,019,000. The liquidator had, in fact, deducted what had been approved by the COI and in doing so he was not in contempt of the High Court order. (paras 42-43 & 45)

(4) There was no evidence of non-disclosure or any concealment of information by Gong on the ownership of the Tualang Lands. (para 4)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

Arab Malaysian Finance Berhad v. Badiaddin Mohammad Mahidin & Anor [1997] 1 CLJ 1 CA ***(refd)***

Capital Insurance Bhd v. BS Sidhu [1995] 1 LNS 306 CA ***(refd)***

Davvy International Ltd & Ors v. Tazzyman & Ors [1997] 3 All ER 183 ***(refd)***

Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors [2007] 9 CLJ 373 HC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

LMB v. IJB [2004] AJ No 180 ***(refd)***

Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5 HC ***(refd)***

Sydlow v. TG Kotselas [1996] 14 ACLC 846 ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2003] 2 CLJ 752 HC ***(refd)***

Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd [2003] 5 CLJ 78 HC ***(refd)***

TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow [1995] 1 LNS 320 HC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Appeals [2010] 2 CLJ 1002 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(i), 232(3)(c), 236

Rules of the High Court 1980, O. 45 rr. 5, 7(3), (4)(a), O. 52 r. 2(2)

For the petitioner - YK Heng; M/s Lee Ong & Kandiah
For the liquidator - CL Wong; M/s Skrine

Reported by Ashok Kumar

JUDGMENT

Hasnah Mohammed Hashim JC:

[1] Enclosure 410 is an application by the petitioner for the following orders:

(a) An order that the petitioner be granted leave to commence committal proceedings against Mr Gong Wee Ning pursuant to O. 52 of the Rules of the High Court 1980 (RHC);

(b) Cost of the application to be borne by Mr Gong Wee Ning; and

(c) Such other orders as deemed fit and just.

[2] The grounds of the application are as follows:

(a) The High Court had on 22 June 2001 granted leave to the petitioner to commence committal proceedings against Mr Gong Wee Ning. The *ex parte* order was subsequently set aside on procedural ground as leave was not obtained before the petitioner can apply under O. 52 r. 2(2) of the RHC.

(b) Mr Gong Wee Ning has failed to comply with the order of the Court of Appeal on 4 December 2006 directing that the liquidators complete the liquidation of the companies within four months of the order.

(c) Mr Gong Wee Ning has acted in contravention of the court order dated 21 February 2005 by making payment from the assets of the companies a sum of RM1,019,000 as liquidators' fees as at 15 February 2007.

Facts Of The Case

[3] It is pertinent to set out the background of this matter as there are few applications involved.

[4] The 1st respondent was wound up on 9 June 1994 under s. 218(1)(i) of the Companies Act 1965 *vide* Winding Up Petition No. D2-28-187-1990 presented by Woodsville Sdn Bhd (the petitioner). Mr Gong Wee Ning was then appointed as the liquidator for the 1st respondent pursuant to the winding up order. Aside from this application for special leave from the winding up court there are three applications that have been filed in relation to this winding up matter.

Removal Of Liquidator Application

[5] Tien Ik Enterprises owned all the shares of a company known as Tanjong Tin Dredging Malaysia Sdn Bhd ('TTDM'). TTDM had beneficial interest in three pieces of land, the particulars of which are as follows:

i. Certificate of Title No. 8864;

ii. Lease of State Land Title No. 1395; and

iii. Lease of State Land Title No. 1020.
('the Tualang Lands').

[6] The petitioner had applied on 10 August 1998 to remove Mr Gong as the liquidator (removal application). There were 12 complaints against the liquidators and one of the claims was the non-disclosure of the existence of the Tualang lands and the ownership of the Tualang Lands which the petitioner averred belong to TTDM. According to the petitioner in opposing the application Mr Gong in his affidavit had denied the existence and ownership of the Tualang Lands. The liquidators' reply to that complaint was that they had conducted an investigation and the result of the investigation was that there was no evidence that of the existence of the Tualang Lands. The removal application was subsequently dismissed by the High Court on 31 May 2000 as the court found that the petitioner's contention that Mr Gong did not carry out any investigation on the Tualang lands was without merit. The appeal to the Court of Appeal is however still pending.

Application Pursuant To O. 52 r. 2 Of The Rules Of The High Court 1980 For Leave To Commit

[7] The petitioner then proceeded to file on 22 June 2001 an *ex parte* application pursuant to O. 52 r. 2 of the Rules of the High Court 1980 for leave to commit the liquidator, Mr Gong and David Kuok Khoon Hin who was at that point of time a member of the committee of inspection (COI). The application for leave was allowed by the High Court. On 6 August 2001 the liquidator filed an application by way of notice of motion to set aside the *ex parte* order granted against him. David Kuok also filed a similar application. The *ex parte* order was set aside on 24 July 2003 on the ground that the petitioner ought to have obtained prior leave of the winding up court before filing the application under O. 52 r. 2(2). The petitioner appealed to the Court of Appeal. The Court of Appeal affirmed the High Court decision on 26 February 2009. The petitioner's notice of motion to the Federal Court was dismissed on 18 December 2009.

Liquidators' Remuneration Application

[8] On 19 December 2002 the liquidator filed an application (remuneration application) for the following order pursuant to s. 232(3)(c) of the Companies Act 1965:

(a) The liquidators be entitled to charge and receive remuneration in respect of the liquidation of the companies on a time cost basis;

(b) Further that the liquidators' remuneration for the period from 16 March 1999 to 15 July 2002 as follows be allowed and paid from the assets of the respective companies;

Company	Amount (RM)
Tien Ik Enterprises Sdn Bhd	523,774.00
Tien Ik Credit Sdn Bhd	186,469.00
Tien Ik Sdn Bhd	303,308.00

(c) The liquidators be allowed to draw from the assets of the companies from November 2002 onwards towards the liquidator's remuneration the following amounts on a monthly basis subject to final approval by this Honorable Court upon the dissolution of the companies:

Company	Amount (RM)
Tien Ik Enterprises Sdn Bhd	9,000.00
Tien Ik Credit Sdn Bhd	7,000.00
Tien Ik Sdn Bhd	8,200.00.

[9] This application was dismissed on 21 February 2005 by the High Court judge. No reasons were however given for the dismissal of the application.

The Petitioner's Submission

[10] The petitioner submits that there are sufficient facts that a *prima facie* case of contempt has been committed by the liquidator. The petitioner further submits that as a liquidator Mr Gong has a duty to protect the integrity of the winding up process. Mr Gong according to the petitioner had acted in breach of the orders made by the High Court and the Court of Appeal as follows:

(a) Non disclosure of the existence of Tualang Lands

The petitioner submitted that Mr Gong had represented to the High Court that the Tualang Lands never existed and only subsequently discovered that the Tualang Lands existed and proceeded to dispose the lands without notifying the petitioner. That there was concealment by the liquidator of the facts relating to the Tualang Lands.

On 14 April 2000, Mr Gong had filed an application before the winding up court seeking approval for a sale and purchase agreement dated 1 April 2000 between Giltspur Holding Sdn Bhd and Barun Industries (M) Sdn Bhd for a piece of land under Grant No. 34332, Lot No. 516, section 67 Kuala Lumpur. In his affidavit in support of the application Mr Gong had annexed a letter from Messer HK Wong & Partners a copy of the letter is annexed as PK4. This letter according to the petitioner indicates that the liquidator ie, Mr Gong had knowledge of the Tualang lands. Therefore the petitioner submits that this show that Mr Gong had deliberately misled the court.

Learned counsel for the petitioner submits that it is an important consideration that an *ex parte* order was in fact granted by Justice Datuk Zainun Ali (as she then was) and the very fact that the learned High Court judge granted the order clearly indicates, the learned judge had concluded that there was a *prima facie* case against Mr Gong.

(b) Wrongfully paying themselves remuneration:

The liquidator had purportedly made a payment of RM1,019,000 out of the assets of the companies when there was an order of the court dated 21 February 2005 dismissing his application for such remuneration to be paid. The liquidator had made an application for an order to be entitled to charge and receive remuneration in respect of the liquidation of the companies on a time cost basis and to be paid RM1,013,551 out of the assets of the companies as remuneration for the period 16 March 1999 - 15 July 2002. According to the petitioner Mr Gong had also sought to be paid on a monthly basis the sum of RM9,000, RM7000 and RM8,200 from Tien Ik Enterprises Sdn Bhd Tien Ik Credit Sdn Bhd and Tien Ik Sdn Bhd from November 2002 onwards. The remuneration application was dismissed by the High Court on 21 February 2005. The petitioner submitted that the High Court judge did not at all order that the liquidators were entitled to be paid on a monthly basis any other amount or any other alternative basis.

The liquidator had deducted the amount and by doing so had committed an act which is in contempt of the court's order.

The petitioner referred to para. 53 of Mr Gong's affidavit which was affirmed on 19 May 2010 where he stated that the question of remuneration will only be determined after the completion of the liquidation or that the remuneration should not be based on time cost but on table C of the 2nd schedule of the Winding Up Rules.

In their written submission in reply the petitioner submits that it is not correct to say that the court order dated 21 February 2005 does not state that the liquidator is not entitled to remuneration. The court had in fact stated that the liquidator is not entitled to charge and receive the remuneration sought. The petitioner further submits in reply to the liquidator's submission in reply that Mr Gong is an officer of the court and must therefore abide with all the directions and orders of the court.

The order of the court dated 21 February 2005 clearly states that the liquidators ought not charge and receive any remuneration in respect of the liquidation of the companies and the order was made pursuant to an application of the liquidators. The liquidators had flagrantly disregarded the order and had subsequently filed an application for their remuneration to be paid on another basis shows that the liquidators knew that were not entitled to charge and receive any remuneration. The petitioner referred to Macpherson's Law of Company Liquidation where it is stated that a winding up is only completed when the liquidator has realised all the properties of the company and also distributed the final dividends to the creditors and contributories. Therefore the mere filing of an application for an order to make the distribution does not mean that the liquidation is completed. Further it is submitted that the interim distribution of assets had taken place only pursuant to the application made by the petitioner and not the liquidators.

The petitioner further submits that the companies were ordered to be wound up on 9 June 1994 more than 16 years ago. For that reason the Court of Appeal had set the date of completion of the liquidation. The petitioner further submits that by virtue of the inordinate delay of completion of liquidation, the High Court was right in dismissing the liquidator's remuneration application.

In reply to para. 26 of the liquidators' submission in reply the petitioner submits court order dated 21 February 2005 that was made was consistent with the order of 14 February 1996 and therefore there was no necessity to file the remuneration application.

The liquidators' application for remuneration is excessive and ridiculous and is substantially more than what the court ordered in 2006.

(c) Breach of the order of the Court of Appeal dated 4 December 2006

The Court of Appeal ordered that the liquidators complete the liquidation of the four companies within four months from the date of the order which would have been on or before 3 April 2007. The liquidators had on 2 April 2007 filed an application to the winding up court for determination of "... the proper remuneration payable to the liquidators and for the final return of capital to the contributories and other consequential orders ... " . The application was for final distribution of the assets and for an order that liquidators be paid a sum of RM2,750,207.93 as liquidators' fees and a sum of RM900,000 from the assets of the companies to be retained for legal fees, expenses towards dissolution and other contingencies. The dateline to complete the liquidation was given by the Court of Appeal however the liquidators could not complete the process. This must be regarded as clear evidence of contempt of the court order. The petitioner referred to the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2003] 2 CLJ 752, where Justice Azmel Maamor (as he then was) said:

> As a member of the Bar and an officer of the court it is incumbent upon her to abide and respect decision of the court. The order of injunction issued by the learned judge was very clear ... She had shown to have complete disregard to an order of the High Court.

Learned counsel for the petitioner also submitted that the cases referred to by the liquidators ie, *LMB v. IJB* [2004] AJ No. 180 and *Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor* [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5 are cases on committal proceedings proper and not on leave to commence committal proceedings. Therefore the cases cited are not relevant or applicable to the present matter before the court.

As to the service of the order all cases cited by the liquidator's counsel do not involve orders that are directed by the courts to their officers. The liquidators are officers of the court and as such answerable to the court if they fail to discharge their duties. Learned counsel submits that where a party has given an undertaking which

has been embodied in an order of the court, it is not necessary to serve the order on him personally. In fact the court has the power to dispense with the service of the order.

The petitioner cited the case of *Davvy International Ltd & Ors v. Tazzyman & Ors* [1997] 3 All ER 183 where it was stated that:

> ... that the Court would be powerless to deal with cases where a party , who is not served with the Order during the period for compliance, deliberately refused to comply with a mandatory order made in his presence ... .

[11] The Liquidators' Submission

The Allegation That Mr Gong Had Committed Contempt In The Affidavit Affirmed By Him In The Removal Application

The liquidator submits that the petitioner has not adduced evidence that Mr Gong has stated that the Tualang Lands did not exist. The liquidators had said in the removal application that their investigations did not show that the Tualang Lands were assets of TTDM based on a company search, examination of the audited accounts of Tien Ik Enterprises as at 1986, examination of the audited accounts of TTDM as at the end of 1992 and a land search on the Tualang Lands which showed that the lands were owned by Tanjong PLC. Subsequently in November 1998 David Kuok informed Mr Gong that TTDM was in fact the beneficial owner. However in December 1998 from information received from David Kuok it was discovered that the Tualang Lands indeed were beneficially owned by TTDM.

[12] The liquidators then arranged for the transfer of the lands to TTDM. The original land titles were forwarded to the liquidators on 11 December 1998 by David Kuok. According to Mr Gong he sought advice of his then solicitors ie, Messrs Lee Hishamuddin as to the action which he should take in particular with regards to the Tualang Lands. His solicitors advised that there was no necessity to file a further affidavit for the following reasons:

(a) the High Court had already directed that no further affidavits be filed after 26 October 1998 without leave;

(b) the hearing of the removal application was over and the High Court at that point of time had reserved decision;

(c) the issue of the ownership of the Tualang Lands was not an issue before the High Court.

[13] The removal application was dismissed by the High Court on 31 May 2000. The petitioner appealed against that decision which is still pending in the Court of Appeal.

[14] On 20 April 2001 the petitioner filed a notice of motion, *ex parte* under O. 52 r. 2(1).

[15] The *ex parte* leave against the liquidator was set aside by the High Court because special leave to commence committal proceedings must be obtained first. The petitioner appealed against the decision of the High Court judge to the Court of Appeal. The Appeal was however dismissed.

[16] Learned counsel for the liquidators cited the case of *Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors* [2007] 9 CLJ 373 where it was held that:

> To prove an offence of criminal contempt the petitioner would have to establish or clinch three essential ingredients namely: (i) the statement deposed to is in fact false and misleading (*actus reus*); (ii) the statement was intended to be false and misleading (*mens rea*); and (iii) the statement was made with the actual or inevitable intention or consequence of frustrating or obstructing the administration of justice or interferences with or impedes the administration of justice.

[17] The liquidator further submitted that Mr Gong had not made an assertion in his affidavit in the removal application that the Tualang Lands did not exist. The petitioner has not shown any evidence that Mr Gong had made such a statement and therefore the petitioner has failed to proof on a *prima facie* basis.

Contravention Of Court Order Dated 21 February 2005

[18] The liquidators submit that the court order dated 14 February 1996 has not been set aside by the court order dated 21 February 2005. The court order merely states that the liquidators remuneration application is dismissed with costs and does not order or direct Mr Gong to do or not to do anything nor that the liquidators are not entitled to remuneration. The case of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92 was referred to by learned counsel for the liquidators where it was held by the Federal Court that the High Court has no power to alter vary or set aside a judgment regularly obtained. The COI had approved the liquidators drawing a monthly retainer of RM5,000 for all four companies. It is further submitted that since the COI had approved the remuneration in August 1999 the liquidators are therefore entitled to the remuneration. After the date of the court order the liquidators had only drawn monthly allowances of RM5,000 for all the

four companies. The dismissal of the remuneration application according to the liquidators had no effect on the validity of the payment of RM544,000 as remuneration as at 15 March 1999. The liquidators further submits that the sum of RM1,019,000 until 15 February 2007 actually comprised of the following:

(a) the remuneration approved by the COI of RM544,000 until 15 March 1999 which was deducted prior to filing of the remuneration application;

(b) the balance sum of monthly advances of RM5,000 for a period of seven years and 11 months between March 1999 and February 2007.

[19] The liquidators submitted that they are entitled to draw the abovementioned sum as monthly advances pending the final determination of the remuneration. Therefore there is no *prima facie* evidence that Mr Gong has contravened the court order dated 21 February 2005.

Alleged Breach Of The Consent Order Dated 4 December 2006

[20] The liquidator submits that when the order was made by the Court of Appeal, Mr Gong was not present and had not instructed the solicitors that the liquidation could be completed within four months. According to the liquidator at that time all the properties which were to be realised and sold had already be realised and sold and interim distributions had been made. The liquidators had even filed an application on 2 April 2007 for leave to make final distribution to the contributories and for the determination of their remuneration based on table C of 2nd schedule of the Companies (Winding Up) Rules 1972. It is the liquidators' submission unless the remuneration is determined and paid the liquidation cannot be completed as, *inter alia*, the costs, expenses and remuneration have first priority over any other stakeholders in the liquidation. Mr Gong submits that the liquidation had been substantially completed and the literal completion of the liquidation is not possible until the petitioner's removal application has been disposed. Further the court order has not been served on Mr Gong personally neither does it contain the penal endorsement referred to in O. 45 r. 7(4)(a) of the RHC. Therefore without the penal endorsement and the service the petitioner does not have a *prima facie* case to commit Mr Gong.

[21] The liquidator referred to the case of *Capital Insurance Bhd v. BS Sidhu* [1995] 1 LNS 306 where the court held that even though the parties was present in court and heard the order directing him, the order must be served on the parties.

[22] The case of *LMB v. IJB* [2004] AJ No. 180 was also referred to by the liquidator where it was held that a court would not commit anyone for contempt where non-compliance is due to circumstances beyond the control of the party alleged to be in contempt. In this case it is the submission of the liquidators that leave ought not to be granted because it is due to circumstances beyond the control of Mr Gong that the liquidation cannot be completed within the time fixed by the court.

The Law

[23] A liquidator having been appointed by the court is an officer of the court and being an officer of the court the acts of the liquidator are in fact made under the authority of the court. The powers of the liquidator are set out under s. 236 of the Companies Act 1965. The exercise of the powers by the liquidator conferred by the aforesaid section is subject to the control of the court. Since the liquidator is an officer of the court for any actions against the liquidator, leave is required. Abu Mansor, J in *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* said that:

> ... It goes without saying leave of the Court is needed before an action is commenced against him and officers like him. We would cite the legal position of receivers who are in the same position as officers of Court. In the text book the *Law Relating to Receivers, Managers and Administrators* by Hubert Picarda at page 339 the learned author wrote:
>
> > A receiver, in the words of Viscount Haldane LC, 'is an officer of the Court put in to discharge certain duties prescribed by the order appointing him'. ... He is 'nothing more than the hand of the Court'. ... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the Court ... .

[24] In determining whether leave should be granted or not the court has to satisfy itself that there is no wrongful interference of the liquidation process. Justice Ramly Ali (as he then was) in *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516 said that:

> In ascertaining whether leave ought to be granted, the court has to satisfy itself that there is no wrongful interference in the liquidation process. The court will not allow the liquidator to be subjected to unnecessary litigation or for a winding-up process to be wrongfully impeded. One way in which the court achieves this is by requiring the grant of leave before an action can be brought against a liquidator.

[25] The court's primary concern is to ensure the liquidation process is completed in fair, orderly and proper manner without any frivolous and/or vexatious interference.

[26] *Sydlow v. TG Kotselas* [1996] 14 ACLC 846 at p. 852 where it was held:

> ... the Court must protect the integrity of the winding-up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongly impede that process. One way in which this can be carried out is to require the grant of leave by the Court in respect of any action against an official Liquidator, so that the Court can satisfy itself that there is no wrongful interference with the process.

[27] The liquidator in carrying out his statutory duties does not have an easy task. He may be subjected to complaints and accusations of unfairness when carrying out his statutory duties. In the case of *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 1 LNS 320 it was held that the task of a liquidator ...,

> ... is an onerous one. He is charged with a number of statutory duties ... He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might level against him. He ought to be protected against such abuse unless here is sufficient *prima facie* evidence to support such allegation. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegation he be given leave to bring an action against a Liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstance come to a halt. No one will venture towards this task. A Liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.

[28] In the instant case the petitioner alleged that the liquidator has failed to carry out as duties as a liquidator by not conducting proper investigation, on disclosure of information and not complying with court orders. Counsel for the petitioner submitted that there are sufficient facts that a *prima facie* case of contempt has been committed by Mr Gong because as a liquidator he has a duty to protect the integrity of the winding up process. Mr Gong according to the petitioner had acted in breach of the orders made by the High Court and the Court of Appeal.

Non-Disclosure Of The Existence Of Tualang Lands

[29] The issue of the non-disclosure of the existence of the Tualang Lands is the subject of this leave application and also the leave application filed on 22 June 2001. The High Court had allowed the leave application. Subsequently it was set aside by the High Court as the leave was granted without obtaining the leave from the winding up court. On appeal to the Court of Appeal the decision of the High Court judge was

upheld. The Court of Appeal found no merits in the appeal against David Kuok and held that the learned High Court was correct in setting aside the *ex parte* order. As for Mr Gong the Court of Appeal in dismissing the appeal, the court held that:

> ... Whether the purported action against the liquidator is in the other court or in the winding up court is irrelevant. In the instant case the appellant alleged that the liquidator has committed contempt of court by failing to conduct any investigation on the existence of the Tualang lands as a result of which it is initiating committal proceeding against the liquidator in the course of the winding up of the first respondent. The liquidator has yet to be released or has yet to apply for an order that he be released and that the company be dissolved. Pending that, he is still an officer of the court and any proposed action against him by the petitioner as in this case for any alleged wrongdoing will still need sanction of the winding up court.

[30] Learned counsel for the petitioner in his submission urged this court to grant leave as there is sufficient evidence of contempt committed by Mr Gong. The very fact that the learned High Court judge granted the order clearly shows that the court had concluded that there was a *prima facie* case against Mr Gong.

[31] I don't think that it is as simple as that. The court has a duty to ascertain that there is sufficient evidence to show that the liquidator had indeed committed contempt. In *See Teow Guan v. Kian Joo Holdings Sdn Bhd* Nallini Pathmanathan J, said:

> ... the Court is bound to keep in mind its duty to protect the liquidator from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding-up process in deciding on whether or not to grant leave. On the facts of any particular case, sufficient merits have to be shown and while it does not necessarily follow that a *prima facie* case must be demonstrated, no specific threshold is set for all cases, as each case must be evaluated and analysed on its own facts. Notwithstanding this mere assertion is insufficient. The Court is at liberty to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the prospective suit. It is evident therefore that there must be a minimum or threshold level of evidence substantiating the claim of a breach of duty to warrant the grant of leave.

[32] The petitioner had filed an application in 10 August 1998 to remove Mr Gong as the liquidator of the companies. Peter Kuok, the petitioner's director had a list of 12 complaints against the liquidators and in particular, David Kuok. One of the complaints was that the TTDM a wholly owned subsidiary of Tanjong PLC owned immovable properties in Tualang which David Kuok had asked to be given to him. Peter Kuok alleged that the liquidators had not conducted a thorough

investigation of the complaints and therefore should be removed. In the course of the hearing of the removal application, the High Court directed on 11 August 1998 that all affidavits should be filed and served by 26 October 1998 and that no further affidavits were permitted to be filed without leave of court.

[33] The petitioner contends that Mr Gong had represented to the High Court judge that the Tualang lands never existed. He had only discovered that the Tualang Lands in fact existed and was taking steps to dispose it towards the end of 1998 without notifying the Petitioner. To support this, learned counsel referred to a letter from David Kuok to Mr Gong Wee Ning dated 11 December 1998 (exh. GWN3 of Gong Wee Ning's affidavit affirmed on 19 May 2010) where the original titles in respect of the Tualang lands were given to Mr Gong for his further action. Despite becoming aware of the existence of the said lands he chose to conceal this fact from the court.

[34] The liquidator had said in the removal application that the investigations that were conducted by them did not show that the Tualang lands were assets of TTDM. They had not only conducted a company search of TTDM but had also examined the audited accounts of Tien Ik Enterprises as at 1986, examined the audited accounts of TTDM as at 1992 and a land search on the Tualang Lands which showed that the lands were owned by Tanjong Tin PLC. It is submitted by learned counsel for the liquidators that the petitioner has not adduced any evidence to show that Mr Gong had indeed made a statement that he was unaware of the existence of the Tualang lands. The liquidator in his affidavit explained when he was told of the existence of the Tualang lands he had sought the advice of his solicitors and was advised that there was no necessity to file a further affidavit because of the following reasons:

(a) the High Court had directed that no further affidavit be filed after 26 October 1998 except with leave;

(b) the hearing of the removal application was over and the High Court had reserved judgment; and

(c) the question of who owned the Tualang Lands was not the issue before the High Court.

[35] On the issue of the status of the ownership of the Tualang Lands the Court of Appeal (*Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Appeals* [2010] 2 CLJ 1002) held that:

> The issue relating to the Tanjong Tualang lands is one of the twelve complaints raised by the appellant to the liquidators which has been considered by the learned High Court Judge. The issue for

A determination by the High Court then was whether the liquidators had reasonably investigated the matter at the material time of the complaint. As such the fresh evidence sought to be adduced would, in our view, have no determining influence on the learned High Court decision as it would not detract from the finding that the liquidators had indeed discharged their duties in investigating the same.

B

[36] From the affidavits filed there is no evidence of non-disclosure or any concealment of the information on the ownership of the Tualang Lands by Mr Gong.

Payment Of Remuneration

C

[37] The petitioner submits that the court order dated 21 February 2005 dismissing the liquidator's application on remuneration is clear that Mr Gong is not entitled to charge and receive remuneration in respect of the liquidation of the companies. The liquidators having obtained the D order of the court have refused to abide that order. It is submitted by the petitioner that the liquidator had flagrantly disregarded the order of the court as the liquidator had charged and received the remuneration. Mr Gong had proceeded to deduct from the assets of the companies a sum of RM1,019,000 as the liquidators remuneration up to 15 February 2007.

E

[38] Learned counsel for the liquidator submitted that the court order dated 14 February 1996 has not been set aside by the court order dated 21 February 2005. The court order merely states that the liquidators remuneration application is dismissed with costs and does not order or F direct Mr Gong to do or not to anything nor that the liquidators are not entitled to remuneration.

[39] She referred to the case of *Hock Hua Bank Bhd v. Sahari Murad* [1980] 1 LNS 92 where it was held by the Federal Court that the High G Court has no power to alter, vary or set aside a judgment regularly obtained. After it had been entered or an order after it had been drawn up, except under the slip rule. The case of *Arab Malaysian Finance Berhd v. Badiaddin Mohammad Mahidin & Anor* [1997] 1 CLJ 1 was also referred to where the Federal Court held that one High Court cannot set aside another High Court order. Therefore the court order H dated 14 February 1996 has not been set aside by the court order dated 21 February 2005. The order dated 21 February 2005 dismissed the liquidators' application for an increased rate of remuneration:

... Adalah Pada Hari Ini Diperintahkan Bahawa Permohonan I Penglikuidator ditolak dengan kos.

[40] The order dated 14 February 1996 therefore still stands. That order reads as follows:

> ... It Is Hereby Ordered that the Liquidators of the respondents companies shall be at liberty from time to time to apply reasonable amounts from monies and assets in their hands against their fees and disbursements, such amounts to constitute advances against their fees and remuneration when determined under section 232 of the Companies act 1965.

[41] The petitioner submitted that the order was granted prior to any discussion between the liquidator and the COI and the order specifically provided that the remuneration must be determined by s. 232 of the Companies Act 1965. Section 232(3) of the Act provides:

> (3) A liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined:
>
> (a) by agreement between the liquidator and the committee of inspection, if any;
>
> (b) failing such agreement or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or
>
> (c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

[42] There was an agreement between the liquidator and the COI as to the fees to be deducted. The COI had approved the liquidators drawing a monthly retainer of RM5,000 for all four companies. The minutes of the COI meeting on 18 November 1996 (exh. GWN8) in particular on p. 47 of the minutes shows there was a discussion and an agreement on the liquidators' fees.

[43] In the letter dated 7 June 1999 (exh. GWN8) the fees and disbursements at RM144,000 for the 17 month period from 16 October 1997 until 15 March 1999 was agreed by the COI. *Vide* a letter dated 4 August 1999 (exh. GWN8) the COI had approved the liquidators drawing a monthly retainer of RM5,000 for all four companies. Since the COI had approved the remuneration in August 1999 the liquidators are therefore entitled to the remuneration.

[44] The remunerations which the COI has agreed are as follows:

(a) RM544,000 (RM400,000 + RM144,000) until 15 March 1999; and

(b) the balance sum of monthly advances of RM5,000 for a period of 7 years and 11 months between March 1999 and February 2007. The total sum would be RM475,000 (RM420,000 + RM55,000).

[45] The total amount of remuneration would be RM1,019,000. The liquidator have in actual fact deducted what have been approved by the COI and in doing so he is not in contempt of the court order dated 21 February 2005.

Alleged Breach Of The Consent Order Dated 4 December 2006

[46] The Court of Appeal ordered that the liquidators complete the liquidation of the four companies within four months from the date of the order which would have been on or before 3 April 2007. The dateline to complete the liquidation was given by the Court of Appeal however the liquidators could not complete the process. Therefore the learned counsel of the petitioner contends this must be regarded as clear evidence of contempt of the court order.

[47] The liquidator submits that when the order was made by the Court of Appeal, Mr Gong was not present and had not instructed the solicitors that the liquidation could be completed within four months. According to the liquidator at that time all the properties which were to be realised and sold had already been realised and sold and interim distributions had been made. The liquidators had even filed an application on 2 April 2007 for leave to make final distribution to the contributories and for the determination of their remuneration based on Table C of 2nd schedule of the Companies (Winding Up) Rules 1972.

[48] In *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210 it was held:

> Obedience to Court Order
>
> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

[49] In *Capital Insurance Bhd v. BS Sidhu* [1995] 1 LNS 306 the court held that even though the parties was present in court and heard the order directing him the order must be served on the parties.

[50] Order 45 r. 5 of the Rules of the High Court provides: A

(1) Where:

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or B

(b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say: C

(i) with the leave of the Court, an order of committal;

(ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body, D

(iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) of this rule to a judgment or order shall be construed as references to the order made under rule 6 E

(3) Where under any judgment or order requiring the delivery of any movable property the person liable to execution has the alternative of paying the assessed value of the property, the judgment or order shall not be enforceable by order of committal under paragraph (1), but the Court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the property to the applicant within a time specified in the order, and that order may be so enforced. F G

[51] Order 45 r. 7(3) reads as follows:

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(ii) or (iii) unless: H

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of seizure and sale or against whom an order of committal is sought; and I

A (b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act ... .

[52] Order 45 r. 7(4) provides:

B (4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served:

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the C order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so D specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

[53] Ariffin J (as he then was) in *Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd* [2003] 5 CLJ 78 held that:

E The alleged contemnor had not been personally served with the Order as required under O. 45 r. 7(3)(a) Rules of the High Court 1980, nor had he been given the appropriate notice. Furthermore, the Order did not contain the proper endorsement as required by O. 24 r. 7(4) and Form 87 of the Rules of the High Court 1980. Therefore, the alleged F contemnor could not be held for contempt of the injunction order.

[54] Similarly in the instant case the Court of Appeal Order was not personally served on the liquidator as required under O. 45 r. 7(3) RHC. There was no evidence before the court indicative of the fact that the liquidator had any appropriate notice of the order. Therefore G Mr Gong could not be said to have committed contempt.

[55] For the above reasons I concluded that the application for leave to proceed against *inter alia*, the liquidators lacks merit. I accordingly dismiss the application for leave with cost.

H

I